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10 Essential Contract Terms for Broadband Service Agreements

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To sustain an office building's competitive advantage in today's challenging marketplace, landlords must contract with technology service providers to offer Internet access and broadband services for their commercial tenants.

Use of the Internet as a communications tool and for high-speed data transmission, streaming video services and Web-based software applications have become a routine way to conduct business, and is projected to consistently increase as more and more companies fully integrate technology solutions into their business operations. As the business sector becomes increasingly technology-driven and Web-centric, commercial tenants are focusing more intently on the need for fast and efficient telecommunication services to streamline their operations and maximize the return on their technology investments.

If tenants have a choice between office buildings, and only one of the buildings provides them with the telecommunications capabilities they require to implement and integrate their technology investments, the choice will not be a difficult one.

However, these are uncertain times. As the economy has slowed and the shakeout of the communications industry has progressed, numerous private telecom companies focusing on the real estate industry have failed. Incumbent providers continue not only to survive, but also to gain increased market share due to the absence of meaningful competition from the weakened private carrier sector. Fewer reliable communications providers exist to service real estate owners and their constituent tenants. As a result, landlords have very limited choices for the provision of telecom services and the integration of new technology solutions to their portfolios. Furthermore, they must be extremely cautious and diligent about the communications providers they do business with on a prospective basis.

Landlords must approach the selection of each telecommunications provider with the same attention and underwriting analysis that they bring to the assessment of a prospective tenant for their buildings. Before negotiating the terms of any communications contract, landlords should identify each provider serving the market in which their building is located and assess the feasibility of the provider's business plan and long-term financial stability.

Once the landlord is satisfied with the economic viability and the business model of the provider, the parties can move on to focus on the contract that will serve as the foundation for the landlord-provider relationship. On what terms, though, should a service provider be given access to the landlord's building to install the necessary cables and wiring, as well as market and deliver communications services to tenants?

Every broadband service agreement should include ten essential contract terms:

1. Term of Agreement. From the landlord's perspective, the shorter the term, the better. Landlords should attempt to achieve a short-term agreement, yet keep in mind that most providers require a term in the range of 5 years in order to achieve a return of their capital

investment for equipment and wiring in the building. Providers usually request automatic term renewals. Landlords should retain the right to terminate the agreement during the renewal terms on one or two months' notice.

2. Non-Exclusive License Rights. A recent FCC building access order prohibits telecom providers from entering into exclusive contracts with owners for servicing their commercial buildings. Consequently, landlords should only agree to grant to the provider a non-exclusive license to access the building and market specific services to the tenants for the term of the agreement. The license should be subject to revocation if the agreement terminates before the end of the term.

3. Service Definitions; Service Level Standards. The agreement should include a specific definition of the services the provider will offer. The provider should have no right to offer any services, other than those delineated in the agreement without the landlord's prior consent. The agreement should also contain standards for the minimum service levels the provider must honor, including for Internet network availability, performance of site deployment and installation work and provision of customer service and support. For data services, the agreement should specify connectivity speeds for both uploads and downloads of data. The provider should offer technical support for building tenants twenty-four (24) hours a day, seven (7) days a week, 365 days a year.

4. Equipment Room Requirement; Approval of Plans and Specs. The agreement should describe with specificity the location of the provider's equipment and cabling within the building, including the exact square footage of any equipment room required by the provider. The landlord should have the right to pre-approve all plans and specs for the installation work. The landlord should retain a right to require the provider to relocate its equipment in the event of a building emergency or if such relocation is required to repair or renovate the building.

5. Revenue Provisions. Landlords should attempt to require that the provider pay both marketing fees and equipment room license fees in exchange for the license granted to the provider to access the building. Marketing fees are essentially "revenue shares arrangements" where a provider pays to the owner a specified percentage of the provider's gross collected revenues from the building in exchange for the owner's agreement to perform minor marketing activities for the provider. Equipment room license fees are often structured similarly to rent, based upon the amount of square footage required by the provider to house its equipment and the prevailing rental rate for tenant-occupied building space (even if the provider's space is located in the basement, garage or rooftop of the building). Landlords can also generate revenue under the agreement by imposing a termination fee on the providers if the providers terminate the agreement before the expiration of the term. The landlord should include audit rights in the agreement to confirm that the provider properly makes all required payments.

6. Competitive Rates; Marketing of Services. To ensure that the pricing of services for building tenants is competitive, the agreement should specify that the providers will only charge tenants rates for broadband service that are consistent with those being charged by the provider and other carriers for similar services in the particular market area where the building is located. The agreement should also include provisions governing when and how providers may market their services to the tenants (e.g. during reasonable business hours and in a manner pre-approved by the landlord).

7. Default Provisions; Service Transition. Landlords have certainty about their rights and remedies under the agreement should the provider fail to live up to its obligations. Provider defaults should specifically include the failure to timely pay required sums when due, service level failures (e.g. interruption of service a certain number of times during one year) and breaches by the provider of other covenants in the agreement. In addition to the right to pursue remedies available at law and in equity, landlords should have an express termination right under the agreement if the provider is in default. The provider should be obligated to cooperate in the transition of the services to a new carrier should the agreement be terminated for any reason, including a provider default.

8. Absolute Termination Rights. To ensure that the landlord has an “exit strategy” from its relationship with the provider, the agreement should include an absolute right in favor of the landlord to terminate the agreement for any reason. To achieve this right, the landlord will likely be required to pay a termination fee to the provider. The termination fee can be based upon the provider’s unamortized capital investment in the building or the provider’s lost revenue for the remaining term of the agreement (exclusive of renewal periods) based on average revenues achieved by the provider for the preceding six or twelve month period.

9. Equipment Ownership. The agent should include provisions addressing landlord and provider ownership rights in the equipment and wiring installed throughout the building. The landlord should endeavor to achieve buy-out rights for all components of the service delivery system at a price that is based upon the depreciated fair market value of the relevant equipment and wiring on the date of expiration or earlier termination of the agreement.

10. Assignment Restrictions. The landlord must retain control over who is accessing its building and serving its tenants. Consequently, the agreement must contain provisions prohibiting the provider from assigning its rights under the agreement without the landlord’s prior consent. At a minimum, the landlord needs the right to assess whether the proposed successor provider has adequate capital and sufficient technical capability to deliver the communication services to the building tenants in accordance with the provisions of the agreement.

In the midst of all of the current uncertainties about the providers to select, the services and applications to offer, and the best technologies in which to invest, there is one undeniable truth—technology is forever changing the way all companies do business. Owners that do not wisely invest in and integrate technology into the services they offer to their tenants will be left with assets that are no longer competitive or viable.

In this age of the Internet, broadband connectivity is essential to attract high quality tenants. However, it is critically important that landlords choose broadband providers carefully and be equally mindful about the contract terms upon which the provider will offer those services.

The degree to which a landlord can successfully incorporate the recommended contract terms depends heavily on the amount of leverage the landlord has in the marketplace. This will vary significantly if there are competitive, as well as incumbent local exchange carriers servicing the area in which the buildings are located, and if the landlord has the ability to offer the provider more than one building in the owner’s real estate portfolio.

It is unquestionable that the greater the competition among providers, the more likely a landlord can include protective contract measures and revenue share provisions in its

broadband service agreements. Toward this end, landlords should embrace real estate and communication industry initiatives that foster telecom competition and meaningful provider choices for their buildings and their tenants.